

EXHIBIT 1

C. Resources Covered by the Natural Resource Damage Assessment Regulations

Comment: There were numerous comments on the issue of the resources covered by the natural resource damage assessment regulations. Several commenters supported the Department's proposal not to define which privately owned resources are covered by the regulations. These commenters stated that the question of whether a particular resource is covered by the regulations is governed by a wide variety of Federal, State, local, and tribal laws that are constantly evolving. These commenters further stated that trustee officials are the most familiar with these laws and, therefore, are in the best position to determine whether a particular resource is covered by the regulations.

On the other hand, several commenters thought that the regulations should include some limits on the assessment of damages for injuries of privately owned resources in order to avoid overly broad claims and unnecessary litigation. Some of these commenters stated that the Department *14268 had misinterpreted *Ohio v. Interior* and that the court did ask the Department to clarify which privately owned resources are covered by the regulations.

Response: The Department believes that the *Ohio v. Interior* court did not require or even request the Department to define precisely which privately owned resources are covered by the natural resource damage assessment regulations. The court merely asked for clarification of whether the Department intended the regulations to cover any non-government-owned resources.

The scope of resources covered by the natural resource damage assessment regulations is determined by section 101(16) of CERCLA, which defines "natural resources" as:

(L)and, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States * * *, any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

As the court noted, this definition, which is incorporated into [§11.14\(z\)](#) of the rule, extends beyond resources that are actually owned by the government.

Use of the natural resource damage assessment regulations is not restricted to government-owned resources. Trustee officials can use the regulations to assess damages for all natural resources covered by CERCLA. The Department believes that no additional action is needed to comply with the court order.

Not only is development of a definition of the privately owned resources covered by the regulations not required by *Ohio v. Interior*, it is also impractical. The question of whether a trustee official can assess damages for a particular natural resource is governed by CERCLA. **However, CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control. These relationships are created by other Federal, State, local, and tribal laws.** In light of the

diversity of these other laws, the Department believes that the determination of whether a particular privately owned resource constitutes a natural resource under CERCLA is best addressed on a case-by-case basis.

The Department disagrees that lack of a definition of the privately owned resources covered by the regulations will result in overly broad claims and unnecessary litigation. This final rule requires a trustee official to prepare a statement explaining the basis for his or her assertion of trusteeship. This statement must be included both in the Notice of Intent to Perform an Assessment, which is sent to PRPs, and in the Assessment Plan, which is subject to public review and comment. These opportunities for early input from PRPs and the public provide both a check on the trustee officials' discretion and a means of resolving disputes prior to litigation. Other provisions of the regulations, such as the requirement that only committed public uses of resources be included in compensable value, provide additional protection against improper assertions of authority over private property.

59 Fed. Reg. 14262, 14267-68 (emphasis added).